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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 81-1455

DONALD J. SIMPSON,

PETITIONER,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

BATH IRON WORKS CORPORATION,

and

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

RESPONDENTS.

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE BENEFITS REVIEW BOARD

Before

COFFIN, *Chief Judge*,

ALDRICH and BREYER, *Circuit Judges*.

Jonathan W. Reitman, with whom *McTeague, Higbee & Tucker* was on brief, for petitioner.

Stephen Hessert, with whom *Norman & Hanson* was on brief, for respondents.

June 23, 1982

COFFIN, *Chief Judge*. This case requires us to determine whether the Supreme Court's decision in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), which clarified the jurisdictional scope of the Longshoremen's and Harbor Workers' Compensation Act of 1927, should be applied to workers' injuries that antedated the decision.

I. Background

On November 21, 1941, Donald Simpson was working as a welder on board a vessel under construction on a marine railway at the Bath Iron Works shipyard. He fell approximately fifty feet from the deck of the vessel, landing on his back on a set of pipes on the marine railway. He was rendered a paraplegic and has been confined to a wheelchair ever since. The employer (BIW) knew of the injury but never filed a First Report of Injury under the Longshoremen's Act. Simpson sought and received $6,000 from the employer under the provisions of the State of Maine Workers' Compensation Act between December 18, 1941, and April 8, 1948. *See Simpson's Case*, 144 Me. 162 (1949). On March 22, 1977, Simpson filed a claim for benefits under the federal Act. He seeks $1,500 (the difference between the $6,000 recovered under the Maine Act and the $7,500 that was authorized under the federal Act in 1941) plus reimbursement for thirty-six years' worth of medical expenses (available under the federal but not the state Act). The claim was not barred by the Act's statute of limitations, because of the employer's failure to file a First Report of Injury. 33 U.S.C. §§ 913(a), 930(f).

In proceedings within the Department of Labor, the employer posed a series of jurisdictional challenges to Simpson's claim. It is clear that Simpson's injury fell within the coverage of the Act's jurisdictional rule, 33 U.S.C. § 903(a) (Section 3(a) of the Act) as it was interpreted in *Calbeck, supra.*[1] BIW argued that *Calbeck*'s interpretation should not apply retroactively to Simpson's injury; that the claim was barred by the collateral estoppel theory of *Shea* v. *Texas Employer's Insurance Assoc.*, 383 F.2d 16 (5th Cir. 1967), as well as the doctrines of election of remedies, res judicata, and laches; and that Simpson's injury did not meet the federal Act's situs requirement since he fell from the vessel onto land.

[1] In 1972, Section 3(a) was amended. The parties agree that those amendments had no effect on Simpson's already existing claim.

The Administrative Law Judge dismissed Simpson's claim on the basis of the employer's second argument, holding *Shea, supra,* controlling. The Benefits Review Board disagreed and held that *Shea* was inconsistent with *Calbeck.* Nevertheless, the Board affirmed the dismissal of Simpson's claim. In a split decision, Administrative Appeals Judge Miller dissenting, it reasoned that *Calbeck*'s analysis of Section 3(a) was not to be applied retroactively.

We have jurisdiction to review the Board's decision, pursuant to 33 U.S.C. § 921(c). The Director of the Office of Workers' Compensation Programs has, as a party-respondent, *see Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C. Cir. 1982), filed a brief in support of the petitioner, urging reversal of the Board.

II. The Retroactivity of *Calbeck*

A. The *Calbeck* Holding

Calbeck v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), considered two cases, each arising out of facts indistinguishable from those before us here. In each case, a worker had been injured while laboring aboard a new vessel that was still under construction, but already afloat on navigable waters. The insurance company in *Calbeck* had prevailed before the Fifth Circuit Court of Appeals, *Travelers Ins. Co.* v. *Calbeck*, 293 F.2d 52 (5th Cir. 1961); *Avondale Shipyards, Inc.* v. *Donovan*, 293 F.2d 51 (5th Cir. 1961) on the basis of the following syllogism:

> 1. Section 3(a) of the Act declared that compensation was available under federal law only if "recovery ... through workmen's compensation proceedings may not validly be provided by state law."[2] Federal and state jurisdiction were therefore mutually exclusive.

[2] The relevant text of 33 U.S.C. § 903(a) before the 1972 amendments was:

2. A line of cases starting with *Grant Smith-Parke Ship Co.* v. *Rohde*, 257 U.S. 469 (1922), had established the so-called "maritime-but-local" or "local concern" doctrine. According to this doctrine, when an employee performed tasks of "local concern", such as constructing a new vessel on navigable waters, a state law *could* validly provide workers' compensation in a maritime context.

3. Thus, the Longshoremen's Act did not permit federal compensation to workers whose situations were covered by the maritime-but-local doctrine.

(Hereafter we will call this argument "the *Rohde*-3(a) syllogism".)

Despite the neatness of the *Rohde*-3(a) syllogism, the Supreme Court reversed. The Court made several points in its meticulous analysis of § 3(a)'s legislative history. Earlier drafts of section 3(a) had explicitly incorporated the "local concern" doctrine. A House Committee had eliminated the language completely; a Senate Committee had responded to employer complaints about the language by replacing it with the "may not validly be provided by State law" language. The Senate language was adopted, not to incorporate "local concern" obliquely, but rather to eliminate a parliamentary obstacle on an unrelated issue (the exclusion of seamen from coverage). *Calbeck, supra*, 370 U.S. at 122-24 & n.13.

In addition, the purpose of the Act, as stated in the Senate Report, S. Rep. No. 973, 69th Cong., 1st Sess., at 16, was to provide certain compensation for a class of employees who had been denied the certainty offered by state compensation statutes. The Senate Report named three Supreme Court

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"(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmens compensation proceedings may not validly be provided by State law."

cases that had created the need for such an Act: *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); and *Washington* v. *Dawson & Co.*, 264 U.S. 219 (1924). (*Jensen* had declared unconstitutional New York's efforts to apply its state compensation statute to an injury sustained on a gangplank between a vessel and a wharf; *Stewart* and *Washington* had struck down federal statutes attempting to authorize the states to use their own compensation statutes in such cases.) This Senatorial statement of purpose makes no mention of *Rohde* or the local concern doctrine. *See Calbeck, supra*, 370 U.S. at 126 n.14. Moreover, the *Rohde*-3(a) syllogism would undermine the stated goal. It would eliminate certainty because "the contours of the 'local concern' concept were and have remained necessarily vague." *Id.* at 124. It would perpetuate the risk that some maritime employees would be covered by neither federal nor state laws, wherever a state chose not to push its coverage to the Constitutional limit. *Id.* at 125. And it would make "federal coverage expand and recede in harness with developments in constitutional interpretation as to the scope of state power, [meaning] that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that that implies; and that each and every award of federal compensation would equally be a constitutionally premised denial of state competence in a like situation." *Id.* at 126.[3]

B. The Benefits Review Board Decision

In its opinion below, the Benefits Review Board concluded that *Calbeck*'s interpretation should not be applied to all claims arising out of injuries since 1927. It anchored its

[3] Justice Stewart and Justice Harlan dissented. 370 U.S. at 132-38. They dubbed the majority approach an "exercise in judicial legerdemain", arguing that the clear language of the statute supported the *Rohde*-3(a) syllogism. They offered an alternative explanation for the legislative history, and they accused the majority of departing from precedent.

analysis in the following language from *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971):

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, *see, e.g., Hanover Shoe* v. *United Shoe Machinery Corp.*, [392 U.S. 481,] 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, *see, e.g., Allen* v. *State Board of Elections*, [393 U.S. 544,] 572. Second, it has been stressed that 'we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter* v. *Walker*, [381 U.S. 618,] 629. Finally, we have weighed the inequity imposed by retroactive application for, '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' *Cipriano* v. *City of Houma*, [395 U.S. 701,] 706."

The Board majority, impervious to the protestations of its own dissenting number, embraced the views of the *Calbeck* dissent to support its belief that *Calbeck* established a new principle of law. It then declared that *Calbeck*'s purposes would not be promoted by applying it to Simpson's claim, but purported to reserve judgment on whether those purposes might be promoted by retroactive application to other, different claims. Finally, it concluded that the balance of equities favored BIW over Simpson. It held that the controversy was governed by "the law in effect during the time when claimant's state claim was pending" — "the maritime but local rule, at that time incorporated by Section 3(a)". Since we

disagree with the manner in which the board applied *Chevron Oil* to this case, we must vacate its judgment.

C. Preliminary Observations on Retroactivity

A fundamental perspective that must inform our analysis is that the retroactive applicability of judicial decisions of federal courts is the rule, not the exception. This century[4] has seen the Supreme Court establish that both state courts, *see Great Northern Railway* v. *Sunburst Co.*, 287 U.S. 358 (1927), and federal courts, *see Linkletter* v. *Walker*, 381 U.S. 618 (1965), may legitimately conclude that justice requires a decision to be applied non-retroactively. But, at least in the federal courts, the strong presumption has remained in favor of retroactivity. *Robinson* v. *Neil*, 409 U.S. 505, 507-08 (1973); *Miro Martinez* v. *Compania Transatlantica Espanola*, 643 F.2d 897 (1st Cir. 1981). This presumption follows in part from the fact that every federal decision applies "retroactively" to a set of facts that has already taken place.[5] The presumption promotes uniform treatment of litigants, since the reasons that lead the court to make such a "retroactive" decision should apply with equal force to other similarly situated litigants, no matter when their cases arise. Most court-made

[4] The early history of the theory of prospective judicial decisions is reviewed in detail in *Linkletter* v. *Walker*, 381 U.S. 618 (1965). The associated theoretical problems have long been a source of interest to scholarly commentators. *See, e.g.*, Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 58-69 (1965); Schaefer, *The Control of 'Sunbrusts': Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631 (1967); R. Keeton, *Venturing To Do Justice* 25-53 (1969); Beytagh, *Ten Years of Non-retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557 (1975); R. Aldisert, *The Judicial Process* 877-938 (1976).

[5] In theory, at least, this is a result of Article III's requirement that the federal courts resolve only cases and controversies. *See Stovall* v. *Denno*, 388 U.S. 293, 301 (1967). Statements of principle that do not apply to the case that spawns them are technically dictum, even though they may in practice be accorded precedential force. *Cf. Morrissey* v. *Brewer*, 408 U.S. 471, 490 (1972).

law is interstitial, constrained by previously enacted principles of positive constitutional and statutory law, and merely clarifies points that were previously open to debate. It is applied retroactively, since that is usually the fairest, least arbitrary way to proceed. *Cf. Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974) (federal statute modified between trial decision and appellate decision; new version must control); *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) (state Supreme Court reversed prior holdings between federal trial and federal appeal; new interpretation must control).

Yet sometimes retroactivity would be excessively unsettling. At times a decision not only makes law, it effects a *volte-face*. Even in such cases, retroactivity would still provide for the most uniform application of the new, correct legal standards, but that interest in uniformity is outweighed by the need to protect justifiable reliance on a contrary, seemingly authoritative view of the law. Thus, the Supreme Court has given only prospective effect (other than application to the case before it) to some cases that overruled prior doctrine. *E.g., Daniel* v. *Louisiana*, 420 U.S. 31 (1975); *Mackey* v. *United States*, 401 U.S. 667 (1971); *Williams* v. *United States*, 401 U.S. 646 (1971); *Fuller* v. *Alaska*, 393 U.S. 80 (1968); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Linkletter, supra*. And, in the area of criminal procedure, where society through its law-enforcement agents depends daily on whatever the established rules of legitimate police conduct may be, the Court has given prospective effect to decisions creating new rules unrelated to the truth-finding process. *E.g., United States* v. *Peltier*, 422 U.S. 531 (1975); *Hill* v. *California*, 401 U.S. 797 (1971); *Williams, supra; Jenkins* v. *Delaware*, 395 U.S. 213 (1969); *Desist* v. *United States*, 394 U.S. 244 (1969); *Fuller, supra; Stovall* v. *Denno*, 388 U.S. 293 (1967); *Johnson, supra; Linkletter, supra*. *Chevron Oil*'s factors are intended to help courts bring this form of analysis to bear in other legal areas. The factors are not discrete, disem-

bodied tests, but rather offer three perspectives on the central question of retroactivity: was reliance on a contrary rule so justified and the frustration of expectation so detrimental as to require deviation from the traditional presumption of retroactivity?

Before applying *Chevron Oil*'s factors to this case, we address a question on which the Supreme Court has not yet given explicit guidance: should the factors (and the issue of reliance) be analyzed in light of the particular litigants in a given case, or in light of general patterns throughout society? We address this question, first, because respondent BIW contends that *Calbeck* should not be applied retroactively in this case for the reason that Simpson was not denied a remedy but in fact received all that the state compensation system offered. We address it for the additional reason that language in *Chevron Oil* arguably supports a highly particularistic, if not atomistic, application of retroactivity, such a reading having been adopted in the recent case, *Wachovia Bank and Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980). We believe that the more general perspective should control.

The question is whether a new decision's retroactivity is decided just once, or is decided anew in each case raising the issue. We know of no cases that have been applied prospectively to some litigants and retroactively to others. This is undoubtedly because such a rule would be unworkable. An individualized inquiry into reliance in each case would force courts to spend energy in each case determining how the law on an issue appeared at any given moment in history. It would also require detailed investigation into the facts bearing on the quality of particular parties' reliance. Thus, once the *Chevron Oil* analysis is applied to a particular decision of law, the result — whether "retroactive" or "prospective" — should govern all subsequent cases.[6] Such, of course, was the

[6] We therefore must withdraw our dictum in *Jackson* v. *Justices of the Supreme Court of Mass.*, 549 F.2d 215, 218 n.2 (1st Cir. 1977), where we implied that our holding of non-retroactivity might be limited to certain would-be beneficiaries of the new rule.

result when, for example, the ruling in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was made retroactive, *Johnson* v. *New Jersey*, 384 U.S. 719, 733-34 (1966); courts were not expected to search whether, in fact, suspects in custody had lawyers, or wanted to consult them, and whether, in fact, police officers had relied on cases such as *People* v. *Hargraves*, 31 Ill. 2d 375 (1964) that had narrowly construed *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

Of course, that conclusion must influence the manner in which the inquiry is conducted; a general decision on retroactivity should not be controlled by specific, possibly aberrational facts. Although the circumstances of particular litigants may be important when they typify general patterns of reliance,[7] case facts per se are not the relevant data in applying *Chevron Oil*. In terms of the values described above, the presumption of retroactivity (and the interest in uniformity) is outweighed when there are sufficient indications of justifiable *societal* reliance on a different rule. We now apply that analysis to *Calbeck*.

D. *Chevron Oil*'s First Factor

Chevron Oil's first factor focuses on how much a decision changes the law. To overcome the presumption of retroactivity, the decision must establish "a new principle of law." 404 U.S. at 106. It can do so "either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* This requires an inquiry into the

[7] This has been the case in several Supreme Court decisions on retroactivity. *E.g.*, *Chevron Oil* v. *Huson*, 404 U.S. 97 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 572 (1969); *England* v. *State Board of Medical Examiners*, 375 U.S. 411 (1964). In each case the Court buttressed its analysis by making reference to the facts of the parties before it and then phrased its finding on retroactivity in general terms.

state of the law when the new decision was handed down.[8] As BIW concedes, *Calbeck* was not an overruling decision. The opinion was explicit in reconciling its conclusion with prior Supreme Court decisions. *Calbeck, supra,* 370 U.S. at 127. BIW contends, however, and the Benefits Review Board held, that *Calbeck* "decid[ed] an issue of first impression" in a surprising manner that "was not clearly foreshadowed."

We note at the outset the difficulty of arguing that a decision that does nothing but interpret a statute in light of its legislative history was not "clearly foreshadowed". Nevertheless, we will not blink the fact that *Calbeck*'s line of analysis stunned most legal commentators;[9] that consideration alone leads us to assume, for purposes of careful analysis, that any "threshold" aspect of *Chevron Oil*'s first factor was met.[10] Yet this is not a particularly significant

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[8] In *Wachovia Bank and Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980), the court concluded that one should analyze the state of the law at the time a particular claim arose rather than at the time of the lawmaking decision. We decline to follow *Wachovia* since it implicitly assumes that *Chevron Oil*'s factors should be analyzed in light of particular litigants' reliance interests. *See* three previous paragraphs in text *supra.*

[9] For commentators surprised by the breadth of *Calbeck, see* G. Gilmore & C. Black, The Law of Admiralty (2d ed. 1976); H. Baer, Admiralty Law of the Supreme Court § 6-4 (2d ed. 1969); Note, 17 Southwestern L.J. 345, 350 (1963); *The Supreme Court, 1961 Term,* 76 Harv. L. Rev. 54, 95-98 (1962); Note, 15 S. Cal. L. Rev. 982 (1963). *But see* Note, 1963 Duke L.J. 327, 331 ("Calbeck was forecast by past decisions"); Note, 35 Tulane L. Rev. 841 (1962) (suggesting that the Fifth Circuit's opinion in *Calbeck* was inconsistent with the legislative history); Note, 50 Cal. L. Rev. 342, 345 (1962) (suggesting that the Fifth Circuit's opinion in *Calbeck* was inconsistent with *Davis*).

It bears mention that *Calbeck* was not a case where the Court based its decision on a new theory not imagined by the parties. Solicitor General Cox and Assistant Attorney General Orrick had presented the argument in full detail in their brief for appellant.

[10] It has frequently been said that an issue of retroactivity "is not even presented" unless a decision satisfies a threshold condition of novelty. This condition has usually been termed a "sharp break" requirement. *See, e.g., Hanover Shoe, Inc.* v. *United States*

step. Almost every plenary decision of the Supreme Court resolves an issue of first impression, narrowly defined, and hardly any is *clearly* foreshadowed. Analysis of *Chevron Oil*'s first factor requires more. It remains for us to determine whether it weighs heavily, moderately, or only slightly against retroactivity. The question is whether preexisting doctrine was so clear as to be likely to induce extensive commitments based on a particular different understanding of the law. Our review of the history leads us to conclude that the legal waters were so muddy before 1962 that it would have been quite imprudent to rely on the *Rohde*-3(a) syllogism.

We note first that the language of § 3(a) was too awkward to inspire much reliance. Many commentators did read it to imply that *Rohde*'s maritime-but-local rule had been incorporated in section 3(a). *E.g.*, G. Gilmore & C. Black, The Law of Admiralty 346 (1957). But that reading was not problem-free, and the *Calbeck* construction was a linguistically defensible alternative.[11] Additionally, the legislative history cut sharply

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Machinery Corp., 392 U.S. 481, 499 (1968). *See also United States* v. *Peltier*, 422 U.S. 531, 544 & n.1 (1974) (Brennan, J., dissenting) (suggesting that the condition has been abandoned); *Milton* v. *Wainwright*, 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting). We see no advantage in attempting to specify where on the continuum of sharpness that threshold might be, if it still exists. Instead we consider the manner in which *Calbeck* changed the law as one of several factors bearing on the justification for reliance on the *Rohde*-3(a) syllogism.

[11] The relevant statutory language is, "*if recovery ... may not validly be provided by State law.*" The *Rohde*-3(a) syllogism interprets the word "may" in a constitutional sense, reading the statute to mean:

> "If it would be unconstitutional for state law to provide compensation, then there is federal jurisdiction."

As has been noted in D. Robertson, Admiralty and Federalism 311-18 (1970), this interpretation makes the statutory word "validly" quite superfluous. An alternative interpretation, consistent with *Calbeck*, would interpret the word "may" in a different sense, reading the statute to mean:

against the *Rohde*-3(a) syllogism, *see Calbeck, supra*, 370 U.S. at 122-26; Note, Tulane L. Rev. 843, 845-56 & nn.10-12.

Nor can it be said that Supreme Court case law would have induced widespread reliance on the syllogism. After the passage of the Act, the Court continued to develop the maritime-but-local doctrine as a limitation on state jurisdiction, but it never held that the doctrine affected *federal* jurisdiction under § 3(a). The only conceivable Supreme Court support for such an inference came in a passing remark in *Crowell* v. *Benson*, 285 U.S. 22, 41 & n.3 (1932). Yet holdings in subsequent cases made it clear that the maritime-but-local doctrine would not be used to oust federal jurisdiction. For example, *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244, *rev'g*, 116 F.2d 789 (4th Cir. 1941), set forth a paradigmatic maritime-but-local fact situation: a janitor in a boat store "had been repeatedly and specifically cautioned and instructed that he was not to get on boats, ride in boats, or perform any services on navigable waters." 116 F.2d at 791. After helping a customer mount an outboard motor, the janitor went out for a ride and drowned. The court of appeals held the federal claim barred by *Rohde* and § 3(a). The Supreme Court reversed, saying that, whether or not maritime-but-local governed these facts, Congress had intended in § 3(a) to provide compensation in the area that certain "specific decisions" — *Jensen, Knickerbocker*, and *Dawson* — had placed beyond the states' reach. 314 U.S. at 248. And the following year, in *Davis* v. *Department of Labor and Industries*, 317 U.S. 249 (1942), the Court declared the existence of a "twilight zone" of injuries that could be compensated under either state or federal law. This

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> "If it is possible that State law might fail to provide constitutionally valid compensation, then there is federal jurisdiction."

Id. Although we do not suggest that we find this latter interpretation more natural in the absence of any legislative history, we are content to note that — on a purely linguistic level — the statute is not unambiguous.

holding was clearly incompatible with the first step in the *Rohde*-3(a) syllogism.

Nor was there much lower-court precedent that would have justified an employer in relying on the *Rohde*-3(a) syllogism until 1962. The only glimmer of encouragement for such a view came in the form of dictum. *Royal Indemnity Co.* v. *Puerto Rico Cement Co.*, 142 F.2d 237 (1st Cir. 1944), *cert. denied*, 323 U.S. 756 (1944), held § 3(a) inapplicable because the case was covered by the Defense Bases Act, but suggested that if § 3(a) had been applicable, it would be construed as limiting federal jurisdiction under the Act to areas in which federal power was exclusive. *Id.* at 238-39. Similar dictum was found in *Union Oil Co.* v. *Pillsbury*, 63 F.2d 925 (9th Cir. 1933).

But although such dicta existed, "[d]eviant rulings by circuit courts of appeals, particularly in apparent dictum, cannot generally provide the 'justified reliance' necessary to warrant withholding retroactive application of a decision construing a statute as Congress intended it." *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295 (1970). Moreover, the holdings in cases that turned on the issue were uniformly to the contrary. In *Continental Casualty Co.* v. *Lawson*, 64 F.2d 802, 805 (5th Cir. 1933), the Fifth Circuit held that "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter." And in *DeBardeleben Coal Corp.* v. *Henderson*, 142 F.2d 481, 483-84 (5th Cir. 1944), the same court waxed fervent:

> "In the application of the act, ... the broadest ground it permits of should be taken.... [T]he Federal Compensation Law now in effect, the judicial tergiversations which went on before its passage no longer have point. This is what we held in the Lawson case, what the Supreme Court held in the Parker case, supra. We adhere to that holding. The judgment was right. It is affirmed."

This was precisely the *Calbeck* analysis, eighteen years before *Calbeck*.[12] Similarly in *Travelers Ins. Co.* v. *McManigal*, 139 F.2d 949 (4th Cir. 1944), the court held that, in interpreting § 3(a) of the federal act, "there is no room for the application of the rule announced in cases of the *Rohde* class." *Id.* at 953. *See also Travelers Ins. Co.* v. *Branham*, 136 F.2d 873 (4th Cir. 1943).

Thus, *Chevron Oil*'s first factor does nothing to rebut *Calbeck*'s presumptive retroactivity. Indeed, it supports it.

E. *Chevron Oil*'s Second Factor

Chevron Oil's second factor draws us to consider whether retroactivity would be inconsistent with the purposes of *Calbeck*. The case sought to implement Congress's desire that the Longshoremen's Act provide the federal scheme of compensation to a certain, clearly identified class of workers. Retroactive application would provide that certainty equally to all employees injured since the passage of the Act. Nonretroactivity would leave workers injured before 1962 without the certain remedy that the 1927 Congress supposedly intended to provide. Thus, retroactivity would be consistent with *Calbeck*'s purpose, and nonretroactivity inconsistent.

In its opinion below, the Benefits Review Board majority found nonretroactivity wholly consistent with *Calbeck*'s purposes. It reasoned, first, that *Calbeck* could be given limited retroactive effect, applying only to litigants who (unlike Simpson) had never accepted benefits under a state scheme. Second, it suggested that general retroactivity would loose "a flood of litigation" on the courts, thereby promoting the uncertainty and lawsuits that *Calbeck* sought to eliminate.

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[12] Indeed, the Fifth Circuit opinion that was reversed by the Supreme Court in *Calbeck* had sought to overrule *DeBardeleben* and *Lawson*. *See Travelers Ins. Co.* v. *Calbeck*, *supra*, 293 F.2d at 58.

As we have noted above, it is error as a general proposition to assume that a single rule can be applied retroactively as to some litigants but not as to others. This point has special strength in analyzing *Calbeck*. In *Calbeck* itself relief was unquestionably available to the two workers under state law, and benefits had in fact been paid under state law in one of the two cases. The Court nevertheless reasoned broadly, and supported its construction of section 3(a) by noting that in other, more typical cases, such a remedy might not be assured. 370 U.S. at 125. It would be peculiar indeed if the analysis of retroactivity should be bound by particular case facts when the underlying decision was not so constrained.

Similarly, we are unmoved by the Board's fear of a flood of litigation. The majority expressed its fear as a bald assertion, unsupported by evidence or expert predictions. Moreover, that fear is illogical. At the time *Calbeck* was decided, the theory of federal nonretroactivity was still inchoate. Any flood that the decision might have stimulated would certainly have come early in the 1960's, not in the 1980's.

F. *Chevron Oil*'s Third Factor

Chevron Oil's third factor requires us to consider the equities of retroactivity. Claimants in Simpson's position assert that they should receive the benefits that the 1927 Congress said they were entitled to. The interests of employers in BIW's position are those of reliance — allegedly an employer of a *Rohde*-type employee would have chosen to forgo insurance against liability under the federal act. The equitable strength of these reliance interests varies with both their justification and their extent. As we have seen, an employer would have had only slight justification for relying on the *Rohde*-3(a) syllogism.

Furthermore, the extent of that reliance — though not easily gauged — does not seem to have been substantial. One possible approach to measuring the extent of reliance might

be to determine the potential gross liability that employers in BIW's position assumed by not carrying federal liability insurance before *Calbeck*. The record contains no evidence of how many employers forwent federal liability insurance because of the *Rohde*-3(a) syllogism, how many of those employers' workers would actually have been declared maritime-but-local, how many of those employees actually became injured, and how much the injured employees were entitled to receive in federal benefits. Given the ceiling on federal compensation[13] (even before subtracting any benefits already recovered under state law), we doubt the final figure would be very large.

An alternate approach to measuring the extent of reliance might be to compute the amount of money employers in BIW's position would have saved by limiting their insurance coverage to state liability. The record again gives no guidance, but a widely cited secondary source reports that, at the time *Calbeck* was decided, there was "a standard workmen's compensation policy used by all carriers on a nationwide basis, which may be extended by endorsements, to cover operations subject to the Longshoremen's Act . . . [T]he only extra expense to the employer for coverage under both acts

[13] Between 1927 and 1948, compensation under the federal act was limited to $7500. Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, § 14(m), 44 Stat. 1432. Between 1948 and 1956, the ceiling was removed for cases of permanent total disability or death, and was raised to $11,000 (sometimes $10,000) for other cases. Act of June 24, 1948, ch. 623, § 5, 62 Stat. 603. Between 1956 and 1961, the ceiling was raised to $17,280. Act of July 26, 1956, ch. 735, § 5, 70 Stat. 655. Between 1961 and *Calbeck*'s decision in 1962, the ceiling was raised to $24,000. Act of July 14, 1961, P.L. 87-87, § 3, 75 Stat. 203.

Of course "compensation" does not encompass reimbursement for medical expenses. Thus, § 14(m)'s ceiling only limited employers' potential retroactive liability for the other (less easily measured) aspects of maritime-but-local workers' damages. We mention the ceiling only as one factor supporting our conclusion that the employers' potential gross liability is not so extraordinary as to deserve special weight.

is a small fee that the carriers charge for the endorsement to the second act." Note, 50 Cal. L. Rev. 342, 347 (1962). *Accord*, Comment, NACCA L. J. 200, 203, 206 (1964); Gardner, *Remedies for Personal Injuries to Seamen, Railroadmen, and Longshoremen*, 71 Harv. L. Rev. 438, 449-50 & n.34 (1958). No matter how one approaches the measurement of employer reliance, we have no reason to think it was particularly extensive.

We think guidance in balancing the equities of employers and employees may be taken from *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). That case upheld the retroactive application of the Black Lung Benefits Act of 1972. The statute required coal mine operators to compensate former employees who terminated their work in the industry before the Act was passed and who developed pneumoconiosis after leaving their jobs. Even though it was possible "that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis", the statute was upheld in order "to spread the costs of the employees' disabilities to those who had profited from the fruits of their labor — the operators and the coal consumers." *Id.* at 17-18. Even though the presumptive validity of a statute may be greater than the presumptive retroactivity of a judicial decision, *Usery* is relevant here as a clear evaluation of the balance of equities between disabled employees and employers who claim reliance on prior law.

When the situation is analyzed in light of *Chevron Oil*'s three factors, we are not persuaded that *Calbeck* was decided in the face of such widespread justifiable reliance on the *Rohde*-3(a) syllogism as to overcome the general presumption of retroactivity. *Calbeck*'s holding should therefore govern all decisions under the 1927 Act.

III. Other Asserted Grounds for Affirmance

The respondent BIW urges that even if *Calbeck* was retroactive, Simpson's claim should have been dismissed in accord with the Fifth Circuit's holding in *Shea* v. *Texas Employers Insurance Assoc.*, 383 F.2d 16 (5th Cir. 1967). This argument was accepted by the Administrative Law Judge, but rejected by the Benefits Review Board.

In *Shea*, the Fifth Circuit held that a person who had already recovered through state court litigation was collaterally estopped from arguing in federal court that he satisfied the "may not validly be provided" clause in § 3(a). The court understood *Calbeck* to be a statement that an accident sustained on navigable waters was presumptively beyond the scope of valid state coverage, but where a state court decision explicitly rebutted that presumption, collateral estoppel would not allow it to be revived later in federal court. Thus, the Fifth Circuit would apply *Calbeck* only in the absence of state litigation.

We agree with the Benefits Review Board that *Shea* misapprehended the import of *Calbeck*. *Calbeck* was not just another "twilight zone" case establishing a presumption of federal jurisdiction. Rather, *Calbeck* held that Congress had actually (albeit inartfully) authorized "federal compensation for all injuries to employees on navigable waters." 370 U.S. at 120. That authorization was to be accepted regardless of what a particular claimant had been able to recover under state law. Thus, although a state court opinion could collaterally estop the litigant from debating the scope of state court jurisdiction, the question of state court jurisdiction was simply not relevant in cases under the federal act. *See generally* 4 Larson's Workmen's Compensation Law § 89.53(b) (1981).

The respondent's remaining arguments were not passed upon by the Benefits Review Board below. We believe that its arguments based upon the situs of the injury and the theories

of election of remedies and res judicata are without merit. The argument that Simpson's injury is not covered because he fell onto the ground is inconsistent with the reasoning in *Minnie* v. *Port Huron Terminal Co.*, 295 U.S. 647 (1935). The election of remedies argument was explicitly rejected by the Supreme Court in *Calbeck, supra*, 370 U.S. at 131-32, and again in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 724 (1980). And any res judicata argument (to the extent distinguishable from *Shea*'s collateral estoppel argument) is refuted by the fact that claims under the Longshoremen's and Harbor Workers' Compensation Act may not be pressed in state court. The procedures for pressing claims under the Act are set forth in 33 U.S.C. § 919 *et seq.* We do not pass on the issue of laches which was not considered by the Board, or briefed or argued by either party in this appeal.

The decision of the Benefits Review Board is vacated and the cause is remanded for further proceedings consistent with this opinion.

Adm. Office, U.S. Courts – Addison C. Getchell & Son, Inc.

APPENDIX B

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR
Washington, DC 20036

DONALD J. SIMPSON,
Claimant-Petitioner

v.

BATH IRON WORKS CORPORATION

and

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY,
Employer/Carrier-
Respondents

Filed as Part of the Record Jun. 11, 1981

BRB No. 78-620

DECISION AND ORDER

Appeal from the Decision and Order of William A. Gershuny, Administrative Law Judge, United States Department of Labor.

Jonathan W. Reitman (McTeague, Higbee & Tierney), Brunswick, Maine, for the claimant.

Stephen Hessert (Norman & Hanson), Portland, Maine, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER* and KALARIS, Administrative Appeals Judge.

*Dissent by MILLER, Administrative Appeals Judge, to follow.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by claimant from a Decision and Order (78-LHCA-975) of Administrative Law Judge William A. Gershuny denying benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (hereinafter, the Act). This appeal raises an issue of first impression which required the Board to construe Section 3(a) of the pre-1972 Act and to decide the retroactive effect, if any, of Calbeck v. Travelers Insurance Co., 370 U.S. 114, 82 S.Ct. 1196 (1962). Given the importance and potentially far-reaching effect of this case, the Board held oral argument at Portland, Maine, on August 22, 1979.

The issue on appeal is whether claimant, who was injured in 1941 while working on a ship under construction and who received state workers' compensation, is entitled to compensation under the version of Section 3(a) of the Act in effect at the time of injury. That section provided:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.... [Emphasis added].

33 U.S.C. § 903(a); 44 Stat. 1424 (underlined proviso

repealed in 1972). More specifically, the issue is whether Calbeck, supra, which was decided 21 years after claimant's injury, applies retroactively to the instant case, extending coverage to claimant. Calbeck held that injuries incurred during new ship construction over navigable waters -- injuries which were traditionally compensable only under state compensation statutes -- fall into the twilight zone of concurrent federal and state jurisdiction. Further, it held that a claimant's mere acceptance of state benefits does not constitute a binding election of remedies barring a subsequent award of federal benefits.

The facts in this case are the following. During November, 1941, claimant was working as a welder aboard the deck of a vessel under construction on a marine railway at Bath Iron Works, a shipyard located on the Kennebec River in Maine. He sustained severe multiple injuries when he fell from the deck, injuries which rendered him paraplegic and totally disabled despite prolonged hospitalization and treatment.

Claimant sought and was awarded benefits under the Maine Workmen's Compensation Act at the maximum allowable rate of $18 per week from November, 1941 through April 8, 1948. In 1948, when claimant's accumulated compensation reached the State's $6,000 ceiling on benefits, he petitioned the State Industrial Commission for further reimbursement of medical

expenses and supplies. The request was granted, but the employer and insurance carrier appealed to the Supreme Judicial Court of Maine, which held that the Commission lacked authority to award funds in excess of the $6,000 limit. Simpson's Case, 144 Me. 162 (1949). As a result of the court's decision in 1949, claimant, who has been unemployed and confined to a wheelchair since 1941, received no state compensation or medical benefits after April, 1948. Twenty-nine years after the State judgment and almost 36 years after the injury itself, claimant filed for benefits under the Longshore Act on March 22, 1977.[1]

At a hearing on October 23, 1978, the administrative law judge held that Shea v. Texas Employers' Insurance Association, 383 F.2d 16 (5th Cir. 1967), was dispositive and required dismissal of the claim, because claimant had no right to benefits under the Act at the time of injury. In Shea, the court denied Longshore

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[1]At the hearing, the parties stipulated to the following facts: Employer did not file a first report of injury under Section 39(a); employer did not file a notice of controversion pursuant to Section 14(d); employer had actual notice of the injuries; claimant was an employee "in the common law sense" in 1941; the injury was work-connected; claimant has not worked since the injury; and the claim was mailed to the Department of Labor on March 22, 1977. See Transcript at 18-23.

benefits in a fact situation similar to the instant case. A painter fell from a scaffold in 1960 while working on a vessel under construction but afloat in navigable waters. Prior to the issuance of Calbeck, supra, in 1962, he litigated his claim for state benefits to a final judgment and received an award. He subsequently sought a supplemental award under the Act. Shea held that claimant was barred from seeking a federal award by Section 3(a) of the Act. Since the state court had expressly determined that it had jurisdiction and awarded compensation, the Section 3(a) proviso of the Act ("compensation shall be payable...if recovery... may not validly be provided by state law") was not met; and thus, no Longshore benefits could be awarded. The court held that the twilight zone doctrine of concurrent state and federal jurisdiction established in Davis v. Department of Labor, 317 U.S. 249 (1942), and Calbeck, supra, applies only in advance of trial. The instant claim was no longer in the twilight zone once the state court expressly determined its jurisdiction and awarded compensation.

On appeal, claimant contends 1) that Shea is not dispositive and that Calbeck, supra, should be applied restroactively to the claimant's injury and resulting disability in 1941 and 2) that his claim is not barred by the one year statute of limitations in Section 13(a) because the statute was tolled

under Section 30(f) by employer's failure to file a report of injury pursuant to Section 30(a). In response, employer contends that Shea is dispositive.

The Board's scope of review is governed by statute. 33 U.S.C. § 921(b)(3). It must affirm a decision where the findings and concusions of the administrative law judge are supported by substantial evidence in the record considered as a whole, are not irrational, and are in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965). However, the Board can affirm a decision and order based on reasoning different from that used by the administrative law judge. See United Brands Co. v. Melson, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979).

We decline to adopt the hearing officer's holding that Shea, supra, should be applied to this case. The reasoning in Shea appears to ignore Calbeck's holding that federal coverage is to extend to the limit of Congress's constitutional power, whether or not a particular injury might also be covered by a state law. Calbeck, supra at 117. Also, Shea relies on that part of Section 3(a) which was effectively removed from the Act by Calbeck, and it is therefore an improper application of that section. 4 Larson's Workmen's Compensation Law § 89.53(b) at 16-276, 16-277. Perhaps, for this

reason, Shea has not been used as precedent for courts deciding similar cases. Most importantly, Shea did not specifically consider whether it is proper to apply Calbeck retroactively.

We now turn to the question of whether Calbeck should be applied to an injury which occurred more than 20 years before it was decided. Claimant argues that the Supreme Court could have precluded retroactive application of Calbeck by stating that the decision would apply prospectively only, by limiting the retroactive effect to the case in which the rule was announced, or by retroactively applying Calbeck to pending cases only. However, claimant stresses that the Supreme Court declined to so limit Calbeck, because the court believed that it was interpreting the law as it had stood from the time the Longshore Act was enacted in 1927.

The traditional presumption that court decisions are intended to receive general retroactive effect is consistent with claimant's position. Robinson v. Neil, 409 U.S. 505, 507-8 (1973). However, modern courts have often applied cases only to future litigation, especially where a well-settled rule of law is overruled and it appears unfair and unnecessary to upset the expectations of the parties. See Linkletter v. Walker, 381 U.S. 618, 624 (1965). Where an overruling court does not specify whether its decision is to be applied retroactively, lower courts are entitled to reach their own conclusion as

to this issue. Annot., "Prospective or Retroactive Operation of Overruling Decision," 10 ALR 3d 1371, 1399 (1966). The Supreme Court has not expressly clarified how much retroactive effect Calbeck should have.

In Chevron v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), the court discussed three separate factors to be considered when there is a question of nonretroactivity.[2]

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra, at 496...or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see e.g., Allen v. State Board of Elections, supra, 393 U.S. at 572.... Second, it has been stressed that "we must...weigh the merits and demerits in each rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, supra, 381 U.S. at 629.... Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court

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[2]In Huson, the Court refused to apply one of its decisions retroactively to an action under the Outer Continental Shelf Lands Act for personal injuries sustained on an offshore oil drilling rig. The action was commenced and prosecuted on the reasonable belief, based in federal decisions, that a state one-year statute of limitations did not apply. A Supreme Court decision requiring a contrary conclusion was announced while pre-trial discovery proceedings were pending.

> could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship, by a holding of nonrestroactivity.' Cipriano v. City of Houma, supra, 395 U.S. at 706...

A court, in determining whether a decision should be retroactively applied, must therefore weigh the merits and demerits of a particular case by looking to the prior history of the rule in question, to its purpose and effect, to whether retroactive operation will create or mitigate any injustice, and to what extent reliance was placed on the previous rule. Thus, giving or denying retroactive effect is a matter of judicial policy. Where equity and circumstance warrant, a judicial decision may be given solely prospective effect.

We will now consider the first factor cited in Huson, i.e., whether Calbeck decided an issue of first impression whose resolution was no clearly foreshadowed. Consideration of this issue requires a review of the case law upon whichemployer in this case relied during the time period from November, 1941, when the injury occurred, through April, 1948, when the last payment of state compensation was made. We focus on this period because the purpose of this criteria is to determine whether it was reasonable for the employer to rely on prior case law holding that new ship construction was covered only by state worker's compensation act. Jackson

v. Justices of Superior Court, 549 F.2d 215, 218 (1st Cir. 1977), cert. denied, 430 U.S. 975 (1977); see Brown v. Louisiana, U.S., 100 S.Ct. 2214, 2223 (1980). If it had anticipated furture liability under the Longshore Act, the employer was required to file a notice of injury or death under Section 30(a) of the Act, 33 U.S.C. § 930. Had employer filed the report in this case, the one year statute of limitations in Section 13(a) of the Act, 33 U.S.C. § 913, would have barred the claim, because the injury occurred in 1941 and the claim was filed in 1977.

Our review of the case law, infra, indicates that the court in Calbeck decided an issue whose resolution was unclear during the period from November, 1941 to 1948. Moreover, even looking at the case law during the entire period from November, 1941 until the issuance of Calbeck in 1962, we cannot conclude that Calbeck was clearly foreshadowed.[3]

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[3]In reaching our conclusion, we are fully aware of the Supreme Court's statement in Calbeck, 82 S.Ct. at 1203-1204, that its construction of the Section 3(a) proviso is consistent with its prior decisions in Parker v. Motor Boat Sales, 314 U.S. 244, 62 S.Ct. 221 (1941), Davis v. Department of Labor, 317 U.S. 249, 63 S.Ct. 225 (1942), and Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366, 74 S.Ct. 100 (1953). However, the dissent in Calbeck concluded that the majority's result was not clearly foreshadowed. For almost 40 years, it was unequivocally recognized that, for those employed in new ship construction, recovery for disability or death may validly be provided by

Prior to the passage of the Longshore Act in 1927, the Supreme Court decided Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 42 S.Ct. 157 (1922), in which it established the maritime but local doctrine for determining whether state compensation acts or federal maritime law applied. The Court held that the uniformity of federal maritime law was not prejudiced by the application of state statutes to maritime employment that was local in character, i.e., activity bearing no direct relationship to navigation and commerce. Rohde was an admiralty suit for injuries sustained by a worker on a partially completed ship lying at a dock. The Court dismissed the suit and held that claimant's exclusive remedy was under the state compensation statute.

For at least 15 years after passage of the Act, courts applied the maritime but local doctrine and amassed an elaborate body of law classifying endless combinations of land and maritime employment factors. Since Section 3(a) of the Longshore

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state law, Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 42 S.Ct. 157 (1922), and that the Act does not apply to injuries on navigable waters where a State can constitutionally provide a compensation remedy. 82 S.Ct. at 1208-1209. Larson agrees; he states that in Calbeck the Supreme Court by judicial construction deleted the Section 3(a) proviso from the Longshore Act. 4 Larson's Workmen's Compensation Law § 89.25 at 16-168, 169.

Act literally provided for an absence of state power as a prerequisite for federal coverage, this body of case law defining state power over certain maritime injuries was utilized in determining the scope of the Longshore Act. One of the most clearly delineated distinctions, which started with Rohde, was between injuries incurred during construction work on uncompleted vessels and injuries incurred during repair work on already completed vessels. The former were deemed to be within the purview of state compensation statutes, whereas the latter were deemed to be beyond the reach of state statutes when the injury occurred on navigable waters. Although Rohde was decided prior to the passage of the Act, the Act effected no change in this distinction. 4 Larson's Workmen's Compensation Law § 89.22 at 76-159, fn. 65 (180 ed.).[4] In Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285 (1932), a constitutional challenge to the Longshore Act, the Court stated:

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[4]As support for this conclusion, Larson cites John Baizley Iron Works v. Span, 281 U.S. 222, 50 S.Ct. 306 (1930), which was decided after passage of the Act. The Court held that a claimant injured while doing repair work on an already completed vessel lying in navigable waters could not constitutionally recover under a state compensation act. Repairing a completed ship has a direct connection with navigation and commerce, and hence recovery is under the Longshore Act. The Court distinguished Rohde, supra.

> In limiting the application of the Act to cases where recovery "through workmen's compensation proceedings may not validly be provided by State law," the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature. (Footnote omitted).... Within its sphere the statute wad designed to accomplish the same general purpose as the Workmen's Compensation Laws of the states.

In a footnote, the Court cited John Baizley Iron Works v. Span, 281 U.S. 222 (1930), and Rohde, supra. Thus, the Court implied that the Section 3(a) proviso of the Longshore Act incorporated the "maritime but local" distinction.[5]

The Fourth Circuit interpreted Crowell in this way in U.S. Casualty Co. v. Taylor, 64 F.2d 521 (1933), cert. denied, 290U.S. 639 (1933). The court held that the Section 3(a) proviso means that compensation under the Act may lawfully be paid only in those cases in which a state has no authority to act. Concurrent remedies in both state or federal

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[5] Crowell and Larson's conclusion that the passage of the Longshore Act effect no change in the new ship construction versus ship repair distinction put to rest claimant's contention that the Longshore Act never incorporated the "maritime but local" distinction and that therefore claimant's injury on a ship under construction fell within the jurisdiction of the Longshore Act. Claimant's Brief, p. 5.

proceedings are not available. Relying on Rohde, supra, and Span, supra, the court held that a claimant who was injured while engaged in the construction of a new ship that had been launched but not quite completed could not recover under the Longshore Act, since the state had authority to provide compensation.

The Fifth Circuit, however, in Continental Casualty Co. v. Lawson, 64 F.2d 802 (5th Cir. 1933), rejected Crowell's implication and instead adopted a significantly different interpretation of the Section 3(a) proviso, similar to the view adopted 29 years later by the Supreme Court in Calbeck, 82 S.Ct. at 1205 (1962). Lawson stated that federal compensation laws should be liberally construed to cover every case where the injury occurred in navigable waters; Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter. Since the passage of the Longshore Act, the importance of the question whether jurisdiction over a maritime tort could be asserted under the compensation laws of the states (the Rohde line of cases) or existed exclusively in admiralty, had largely disappeared. The court's result in Lawson, however, conformed to the traditional distinction between ship construction and ship repair. The court held that an injury incurred during repair of a boat on a marine railway was over navigable waters, since the statutory phrase "any dry dock" includes

a marine railway. Hence, the injury was compensable under the federal Act. Because Lawson was not on point factually with the instant claim and because the court appeared to reject the Supreme Court's interpretation of Section 3(a) in Crowell, Lawson did not clearly indicate that employer would have Longshore Act liability.

Thus, until November, 1941 when claimant's injury occurred, the weight of case law held that, under the maritime but local doctrine, claimants injured during the course of new ship construction could not recover compensation under the Longshore Act, but could recover only under a state act. Therefore, employer in the instant case had no reason to believe that the Longshore Act was applicable and had no reason to file a Section 30(a) report within 10 days of the injury. Instead, it promptly paid state compensation benefits.

In the period subsequent to claimant's date of injury, the case law began to change with regard to the maritime but local doctrine and the applicability of the Longshore Act to injuries during new ship construction. In this period, the case law was frequently unclear, conflicting, and controversial. The confusion started with Parker v. Motor Boat Sales, 314 U.S. 244, 62 S.Ct. 221 (Dec. 8, 1941). The court did not apply the maritime but local doctrine to a janitor who drowned in a navigable river when a motor boat in which he was

riding capsized on a trip made to test an outboard motor. The Court held that the Section 3(a) proviso, which allowed federal compensation only if recovery could not be validly provided by state law, did not bar claimant's recovery under the Longshore Act. It held that the field in which a state may not validly provide compensation is the same field which the line of decisions based on Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), excluded from state compensation laws.[6]

In Davis v. Department of Labor, 317 U.S. 249, 63 S.Ct. 225 (Dec. 14, 1942), the Court held that, where a claimant had sought benefits only under a state workmen's compensation act for the death of a structural steel worker who drowned while helping dismantle a bridge, the state could make an award under its compensation law consistent with the federal constitution. The Court announced the "twilight zone" rule: All borderline cases, in which it is doubtful whether the federal or state act applies, are to be resolved in favor of coverage by the first act under which application is made by claimant. 4 Larson's Workmen's Compensation

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[6] Jensen held that the New York's Workmens' Compensation Act could not constitutionally be applied to a stevedore injured over navigable waters on board ship while unloading cargo at a pier. The application of individual state acts to maritime workers injured on navigable waters would prejudice the uniformity of maritime law.

Law § 89.24 at 16-164, 165. The Court stated that the clause in the federal act which makes it exclusive, 33 U.S.C. § 905, "gains meaning only after a litigant has been found to occupy one side or the other of the doubtful jurisdictional line..." 63 S.Ct. at 229 [emphasis added]. Thus, the Court appeared to rule out recovery under both state and federal acts by means of successive awards.

As Larson explains, Davis left open the question of defining the extent of the twilight zone in which there was concurrent state and federal jurisdiction. It was generally assumed until 1949 that "the new doctrine would apply only when new fact combinations appeared which did not range themselves clearly on one side or the other of the twilight zone as marked out by these numerous and well-established precedents [on familiar categories of employment.] If they did so fall outside the twilight zone, it was apparently also assumed that, ...if they fell clearly on the state side under the maritime-but-local cases, state jurisdiction would be exclusive because of the express provision in the Longshore Act abdicating jurisdiction when state acts could validly apply." 4 Larson at 16-165.

Subsequent to Parker, supra, and Davis, supra, but prior to 1948, there were three decisions by U.S. Court of Appeals with differing interpretations of whether Rohde, supra, was still good law in light of Parker and Davis. One of the decisions also

permitted a Longshore award subsequent to a state award. None of these decisions, however, involved an injury during new ship construction. The first case, Royal Indemnity Co. v. Puerto Rico Cement Corp., 142 F.2d 237 (1st Cir. 1944), cert. denied, 323 U.S. 756 (1944), was decided by the U.S. Court of Appeals for the First Circuit -- the circuit in which claimant's injury in the instant appeal occurred. The Court cited Rohde, supra, as good law.[7]

> The clause permitting recovery only where compensation 'may not validly be provided by state law' is not an independent condition, but a limitation upon the previous clause referring to navigable waters, necessary in light of the above decisions [Southern Pacific Co. v. Jensen, and others], and because not all injuries upon navigable waters are exclusively within federal jurisdiction. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922)....

The Court further stated that by the Section 3(a) proviso, Congress "intended to provide federal compensation in the maritime field up to the line where local compensation would not be excluded by the existence of federal admiralty jurisdiction."

The second case, Travelers Insurance Co. v. McManigal, 139 F.2d 949 (4th Cir. 1944), however,

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[7]The case arose under the Longshore Act, as extended by the Defense Base Act. Claimant was injured on a military base in Puerto Rico. The court held that the Section 3(a) proviso was inapplicable to the Defense Base Act.

held that Rohde's Maritime but local doctrine could no longer be applied to bar Longshore Act compensation to a carpenter killed while engaged in construction of a dry dock on a navigable river. The claimant had sought compensation only under the Lonshore Act. The court emphasized that this area of law was controversial and unclear:

> The limits of this doctrine ["maritime but local" doctrine as it related to the Section 3(a) proviso] are by no means clear; and the contrast between the approval of federal jurisdiction in Parker v. Motor Boat Sales [cite omitted] and the approval of state jurisdiction in Davis v. Department of Labor [cite omitted] does not tend to dispel the doubts which beset the courts and the interested parties in this field of law. [emphasis added].

139 F.2d at 953.

Even if employer in the instant case had interpreted McManigal as indicating possible federal concurrent jurisdiction for claimant's injury, the employer was still justified in not filing a Section 30(a) report. McManigal did not raise the issue of whether a claimant could receive both a state award and then a federal award. Employer could have justifiably relied on Davis's rule that coverage by the first act under which application was made by claimant would be upheld, and could rely on the apparent corollary that where a claimant had first sought state compensation benefits, he was limited

to that recovery. Larson notes that, prior to the issuance of Calbeck in 1962, there was substantial question whether the full implications of concurrent state and federal jurisdiction (pursuant to the twilight doctrine) would be followed, in the form of a state award and a subsequent federal award. 4 Larson's Workmen's Compensation Law § 89.53 at 16-273 to 16-277.

The third case was De Bardeleben Coal Corp. v. Henderson, 142 F.2d 481 (5th Cir. 1944). The Court affirmed the dismissal of a suit to set aside an award under the Longshore Act. The claimant had previously recived state compensation benefits for the death of decedent, a member of a shore gang who drowned when he fell off a barge. Employer had contended that since claimant had already received state benefits, the Section 3(a) proviso barred recovery under the Longshore Act. The Fifth Circuit stated that Parker, supra, substantially adopted the view it had previously expressed in Lawson, supra. It then held that by the Section 3(a) proviso Congress did not intend to relinquish any part of the field which it could validly occupy. Rather, Congress intended to save the Act from judicial condemnation by making it clear that it did not intend to legislate beyond its constitutional powers. The Act should be applied very liberally; and prior case law establishing the "maritime but local" doctrine should be disregarded.

Moreover, the court stated that Davis, supra, was an aberration, a quasi-legislative decision, and it disregarded Davis's rule that seemed to limit compensation in a twilight zone case to recovery under either the federal statute or a state statute, but not both.

We do not believe that Henderson clearly foreshadowed Calbeck. Nor do we believe that based on Henderson employer should have filed a Section 30(a) report in order to start the running of the statute of limitations. 33 U.S.C. § 930(f). While Henderson's construction of the Section 3(a) proviso -- essentially reading it out of the Act -- was adopted by the Calbeck court (82 S.Ct. 1196, 1205), the Supreme Court did not adopt that construction until 1962.[8] As late as 1959 in Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 266 79 S.Ct. 266, the Court still recognized the validity

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[8]At 4 Larson's Workmen's Compensation Law § 89.25 at 16-166, 167 Larson notes that the U.S. Supreme Court greatly surprised observers when it later seemed to reject the widely held assumption that past clear precedent defined the scope of the twilight zone. The Court issued two per curian memorandum opinions, Bethlehem Steel Co. v. Moores, 335 U.S. 874, 69 S.Ct. 239 (Dec. 6, 1948), and Baskin v. Industrial Acc. Comm'n., 338 U.S. 854, 70 S.Ct. 99 (Oct. 24, 1949), which dealt with repair work on previously completed vessels. In both, claimants sought state compensation only; and the Court held that the state could award compensation. Thus, the Court allowed concurrent state jurisdiction in a traditionally federal area. These decisions caused

of the Section 3(a) proviso as it had been previously interpreted.

Under the first criterion for nonretroactivity of a case set out in Huson, supra, we conclude that Calbeck, supra, was not clearly foreshadowed by case law. On the contrary, the case law prior to Calbeck was frequently unclear and conflicting. The First Circuit has recently examined the effect of a similarly ambiguous situation in determining the retroactive effect to be given the decision of Breed v. Jones, 421 U.S. 519 (1975), which applied the double jeopardy clause of the Fifth Amendment to juvenile defendants transferred to adult courts after a judicial determination of guilt in juvenile court. Jackson v. Justices of Superior Court of Mass., 549 F.2d 215 (1st Cir. 1977). In discussing the effect of the ambiguous state of the law in this area on the reasonableness of the state's reliance on the old rule, the court said that, "While, concededly, Breed was not a case, which, for example, by overruling prior Supreme Court decisions manifestly

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considerable speculation as to the true meaning of Davis, supra. It is important to note that the Court did not rule on whether the converse was true, i.e., whether there was concurrent federal jurisdiction in a traditionally state area -- the crucial issue for the instant employer, until Calbeck v. Travelers Insurance Co., 370 U.S. 114, 82 S.Ct. 1196 (1962). A conclusion that the converse was true could not be readily assumed because of the Section 3(a) proviso.

marked 'a clear break with the past,' [citation omitted] we do not believe that it was so clearly a mere application of established principles that we could apply it retroactively without further analysis." Jackson, supra at 218. The court then examined the purposes of Breed.

Similarly, the case law at issue here does not show that Calbeck was "a clear break with the past." There were some circuit court cases decided after the date of claimant's injury which might have intimated that his injury was covered under the new "twilight zone" doctrine, but it would be unfair to charge an employer with intuition keen enought to perceive this intimation without the benefit of hindsight. We must, therefore, examine the purposes of Calbeck in order to determine whether these purposes will be furthered or retarded by retroactive application of Calbeck to the present case. This second criteria of Huson, supra, has been described as the most important element of any retroactivity determination. Brown v. Louisiana, U.S., 100 S.Ct. 2214, 2219 (1980).

In Calbeck, the Court read broadly the scope of Section 3(a) of the Act in order to achieve the underlying purposes of the Act itself, which were identified as, "ensur[ing] that a compensation remedy existed for all injuries sustained on navigable waters, and... avoid[ing] undertainty as to the source, state or federal, of that remedy," Calbeck, supra at 124.

The Court therefore rejected a literal interpretation of Section 3(a), which would have extended federal jurisdiction only to cases where a state "may" compensate the employee, because this construction might have created a "vacuum" of coverage, in which states refused to pay claims of maritime workers within an area of "local concern." Id. at 125. If a state "may" constitutionally have provided coverage under the maritime-but-local decisions but simply had not done so, certain workers who were clearly within federal constitutional maritime power, if Congress chose to exercise it, were in danger of being left without any coverage, state or federal. 4 Larson's Workmen's Compensation Law § 89.25 at 16-169, 170. In the instant case, denying retroactive operation of Calbeck will not defeat this purpose, nor will it serve to further this purpose, because claimant received compensation under the Maine workmen's compensation statute. He was not left without a remedy.

As the First Circuit noted in Jackson, supra, at 218, it is possible that the purpose of a decision may or may not be served by retroactive application, depending on the position of parties. The Jackson court found that one purpose of forbidding the transfer of defendants to court after an adjudicatory hearing was the elimination of the heavy pressures and burdens of two trials. Retroactive application would only

serve this purpose if the second trial had not yet taken place. IF it had, retroactive application of the new rule could not undo the damage already done by the second trial.

Here, if the claimant had been denied state as well as federal compensation, the argument for retroactive application of Calbeck would be stronger because it would permit recovery by a claimant who previously was not covered by either state or federal acts. Thisis not, however, the situation here. We therefore need not decide whether such a change in the factual situation would mandate retroactive application.

The Court's second justification for Calbeck was to eliminate the uncertainty, litigation, and changeability of federal coverage which resulted from the incorporation of the maritime but local doctrine into the Section 3(a) proviso. The contours of the doctrine were too vague and made federal coverage depend on developments in constitutional interpretation as to the scope of state power to compensate injuries over navigable waters. 4 Larson at 16-171. We do not see how allowing retroactive application will help eliminate uncertainty and litigation. In fact, were we to apply Calbeck retroactively, a flood of litigation would probably result by workers and employers similarly situated to claimant and the employer in this case. Thus, this second purpose of Calbeck is also neither

defeated nor furthered by denying it retroactive application in this particular case.

Finally, we turn to the third criterion of Huson, supra, which is whether retroactive application of the decision will have an unfair impact on one party which outweighs the benefit to the other party. We conclude that applying Calbeck retroactively would result in greater inequity to employer than benefit to claimant in this case. As our review of the case law indicates, employer discharged its responsibility to claimant under the law as it stood at the time of the injury and for the duration of the state compensation payments. Since it appeared that the Longshore Act was inapplicable, employer had no reason to file a Section 30(a) report during that period to start the running of the statute of limitations.[9] To subject employer at this late date to unexpected liability for an

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[9]The instant unusual case is distinguishable from Cooper v. John T. Clark & Son, 11 BRBS 453 460, BRB No. 78-525 (1979), in which the Board held that employer's lack of definite knowledge that the injury was within the coverage of the Act does not prevent the tolling of the statute of limitation under Section 30(F), where no Section 30(a) report has been filed. The Board in the instant case is not directly ruling on the issue of whether the claim was timely filed under Section 13(a) and Section 30(f). Our comments on employer's failure to file a Section 30(a) report are made in the context of the retroactivity issue and whether it would be just to impose liability on employer, given the state of case law from employer's perspective in the 1940's.

injury which occurred nearly 30 years ago would be unjust.

Rather than retroactively apply Calbeck to this case, we apply the law in effect during the time when claimant's state claim was pending. We hold that the maritime but local rule, at that time incorporated by Section 3(a) of the Act, allowed recovery only under state compensation laws for employees engaged in new ship construction. Thus, the claimant is not covered by the federal Act.

Given our resolution of this issue, we need not reach the other issues raised on appeal: 1) whether the injury occurred over navigable waters, 2) whether res judicata or the doctrine of election of remedies applies, 3) whether the claim is barred by the statute of limitations and the equitable doctrine of laches and 4) whether the Section 20(a) presumption applies to the issue of jurisdiction.

Accordingly, we affirm the Decision and Order below denying benefits.

SO ORDERED.

/s/ Samuel J. Smith
SAMUEL J. SMITH
Chief Administrative Appeals Judge

I Concur: /s/ Ismene M. Kalaris
ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 11th day of June, 1981

APPENDIX C

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR
Washington, DC 20036

DONALD J. SIMPSON,
Claimant-Petitioner

v.

BATH IRON WORKS CORPORATION

and

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY,
Employer/Carrier-
Respondents

Filed as Part of the Record July 28, 1981

BRB No. 78-620

DISSENTING OPINION

MILLER, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' holding that the claimant, Donald Simpson, cannot be afforded coverage under the Act.

I

As a preliminary matter, I would hold that the claimant was injured upon a situs covered by the Act.[1]

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[1]The administrative law judge made no specific findings on the situs issue (other than noting

Unamended Section 3(a) provides,

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law....

44 Stat. 1424; 33 U.S.C. § 903(a). The evidence establishes that, when injured, claimant was working upon a vessel under construction on a marine railway at Bath Iron Works. Pre-amendment case law construed the term "any dry dock" to include marine railways. Maryland Casualty Co. v. Lawson, 101 F.2d 732 (5th Cir. 1939); accord, Avondale Marine Ways, Inc. v. Henderson, 201 F.2d 437 (5th Cir.), aff'd per curiam, 346 U.S. 366 (1953).[2] Employer contends that claimant fell onto "terra firma" as opposed to the marine railway, and is thus precluded from coverage. However, claimant

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that the claimant "fell to the ground" from the deck of a vessel), having disposed of the case on another jurisdictional basis. However, the facts are sufficiently developed to render a jurisdictional determination in favor of claimant, and, therefore, no useful purpose would be served by remanding the case to the administrative law judge for further findings regarding this issue.

[2]Moreover, jurisdiction has been upheld in situations such as the instant one, in which a vessel resting on a marine railway was under construction rather than repair. In Gretna Machine & Iron Works,

was working on a marine railway at the time the events leading to the injury were set in motion. Thus, the maritime situs of the injury was established, and claimant cannot be barred from recovery on the basis argued by employer. See Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935). Compare T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928).

II

I must strongly disagree with my colleagues' determination that the Section 3(a) proviso ("if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law") bars claimant from coverage under the pre-amendment Act. Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), held

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Inc. v. Neuman, 316 F. Supp. 147 (E.D. La. 1970), aff'd, 446 F.2d 550 (5th Cir. 1971), the court held that a graving dock where claimant, a welder assisting a barge construction, fell and was injured while descending a ladder resting against the barge deck, was not excluded from the "any dry dock" language of the Act, even though it was being used exclusively for new ship construction at the time of the accident. See also Kelso Marine, Inc. v. Hollis, 316 F.Supp. 1271 (S.D. Tex. 1970), aff'd per curiam, 449 F.2d 342 (5th Cir. 1971) (holding that the Act covered an employee injured while engaged in building an unlaunched barge on a vertical lift dry dock).

> that Congress used the phrase 'if recovery ...may not validly be provided by State law' in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language... Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.

Calbeck, 370 U.S. at 126-27 [footnote omitted]. In so holding, the Supreme Court established the full reach of pre-amendment Section 3(a) of the Act. See Calbeck, 270 U.S. at 126.

I would reverse the Decision and Order, since Calbeck was an interpretive decision which was in effect at the time this Longshore Act claim was litigated. Assuming arguendo, that Calbeck is an overruling decision, as my colleagues contend, I would find that it should be retroactively applied.

Section 3(a) of the Act is a jurisdictional section. "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospectively only." Firestone Tire & Rubber Co. v. Risjord, 101 S.Ct. 669, 676 (1981).[3] Moreover, in general,

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[3]The Court in Firestone considered whether a motion to disqualify counsel was directly appealable under 28 U.S.C. § 1291. Both 28 U.S.C. § 1291 and 33 U.S.C. § 903(a) are jurisdictional,

> Despite...conflicting views, and even though there have been many departures from the traditional policy in favor of retroactive application of an overruling decision, it is still accepted as a general rule that unless there are special circumstances warranting the denial of retroactive application, or unless the overruling court has expressly indicated otherwise, it may properly be assumed that an overruling decision is entitled to retroactive as well as prospective effect.

Annot., 10 ALR 3d 1371, 1384 (1966) (footnotes omitted).[4]

My colleagues err in ignoring the established principle that overruling decisions, particularly overruling jurisdictional decisions, should be retroactively applied.

While the general principles determining retroactivity of an overruling decision should control, I would also find that Calbeck should be retroactively applied under the test enunciated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). In Huson, the court declined to apply a state statute of limitations made applicable to the case by

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thus the principles of Firestone are applicable to the instant case.

[4]It should also be noted that the retroactive application of an overruling decision is not prohibited by any constitutional provisions. In particular, it does not constitute an impairment of contract or a violation of prohibitions against ex post facto laws, or a denial of due process or equal protection. See Annot., supra, 10 ALR 3d at 1392-93.

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) (issued while the Huson action was pending), which would have barred the claim. To hold the lawsuit retroactively time-barred would be anomalous, the Court stated, inasmuch as a primary purpose underlying the absorption of state law as federal law in the Outer Continental Shelf Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. Discussing the retroactivity issue, the Court cited factors to be considered in determining when retroactive application is appropriate.

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of the first impression whose resolution was not clearly foreshadowed. Although Calbeck established the full reach of the law, its result was foreshadowed by the "twilight zone" cases, which appeared the year of the injury and during the period when employer was paying claimant compensation under the state act. See Calbeck 370 U.S. at 127.

My Colleagues concede that they

> are fully aware of the Supreme Court's statement in Calbeck, 82 S.Ct. at 1203-1204, that its construction of the Section 3(a) proviso is consistent with its prior decisions in Parker v. Motor Boat Sales, 314 U.S. 244, 62 S.Ct. 221 (1941), Davis v. Department of Labor, 317 U.S. 249, 63 S.Ct.

225 (1942), and Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366, 74 S.Ct. 100 (1953).

Majority Opinion, slip op. at 9 n. 3. Nonetheless, my colleagues choose to ignore the majority decision of the Supreme Court, relying instead on the dissent which stated that Calbeck was inconsistent with prior case law. Such reliance is not in accordance with law, since this Board must follow the desicion of the Supreme Court. See United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980); Kicklighter v. Ceres Terminal, Inc., 13 BRBS 109, BRB No. 79-550 (1981). Moreover, my colleagues' position is untenable since Parker, Davis and the other twilight zone cases reflect a rationale for the construction of the Section 3(a) proviso which is consistent with the Calbeck decision.

The second factor to be considered is the purpose and effect of the new rule established, and whether retroactive operation will further or retard its progress. In the Matter of S.S. Helena, 529 F.2d 744 (5th Cir. 1976), applied the Supreme Court's Moragne decision[5] (which established a new cause of action for wrongful death under maritime law) retroactively to an action filed before the date of that decision. Noted by the Court was that

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[5]Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

the primary purpose of Moragne was to "assure uniform vindication of federal policies." 529 F.2d at 748. Similarly, the purpose of the federal Act, and Calbeck's interpretation thereof, was to provide compensation for all injuries to employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy. See Calbeck, 370 U.S. at 724. Thus, retroactive application of the rule would further the purpose of the Act.

The final factor involves a weighing of the equities or inequities that would result from the imposition of retroactive application. Claimant was 27 years old at the time of the accident, and since has neither walked nor been employed. Employer's liability under the state Act was extinguished after 1948, by which point claimant had received $6,000 for injuries which left him a lifetime paraplegic. My colleagues contend that, under these facts, applying Calbeck retroactively would result in "greater inequity to employer than benefit to claimant," since application of Calbeck would result in unexpected liability. My colleagues' balancing of the equities is in clear conflict with the beneficent purpose of the Longshore Act -- an Act intended to resolve all doubts in claimant's, not employer's, favor. See Voris v. Eikel, 346 U.S. 328 (1953).

It should also be noted that if employer had satisfied its duty of filing a Section 30(a) report of injury,[6] claimant would have been advised of his right to file a claim for compensation under the Act, and hence, the decision in Calbeck, as foretold by Parker and Davis, may have been the decision in the instant case. See infra.

Moreover, retroactive application of Calbeck is consistent with case law which has retroactively imposed liability on employers. In Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1 (1976), coal operators contended that to retroactively impose liability upon them for their former employees' disabilities was to impermissibly charge the operators with an unexpected liability for past completed acts that were legally proper at the time. In response to that argument, the Supreme Court stated: "We find...that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor -- the operators and the coal consumers ...." 428 U.S. at 18.

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[6]See Castro v. McLean Industires, 12 BRBS 911, BRB No. 79-419 (1980), where the Board noted that employer's failure to file a Section 30(a) report was not excused by a belief that state workers' compensation was applicable.

The Turner-Elkhorn rationale applies by analogy to the facts of this case. Moreover, as indicated above, other equities weigh in claimant's favor.

III

Certain procedural issues raised by the parties must also be addressed before claimant can establish entitlement to compensation.

Unamended Section 13(a) provided, in part, that the right to compensation was barred unless a claim therefor was filed within one year after the injury. However, Section 30(a) required employer to file a report of injury within 10 days from the date of such injury. Where employer is given notice or has knowledge of the injury, and fails or neglects to file a report thereof, the Section 13(a) statute of limitations is tolled under Section 30(f) until such report is furnished since Section 13(a) does not become a viable issue unless and until Section 30(a) has been satisfied. See U.S.C. §§ 913(a), 930(a), and 930(f).

The parties stipulated that employer had actual notice of claimant's injury and that employer failed to file the Section 30(a) report. Therefore, claimant asserts, his claim was timely filed. Employer argues that Section 30(f) should not be construed to require employers to file reports in order to protect themselves against the prospect

of an "adverse Supreme Court ruling 21 years later," urging that the Board hold the claim barred under Section 13(a) and the equitable doctrine of laches.

"This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongrouous restuls." Voris v. Eikel, 346 U.S. 328, 333 (1953). The Board must "not construe the Act so as to enable [employer's] to escape liability to persons entitled to recover for an admittedly compensable [injury] by reading into it technical restrictions on the tolling of the filing period which are inconsistent with the purposes of the Act." Ingalls Shipbuilding Division, Litton Systems, Inc. v. Hollinhead, 8 BRBS 159, 161, 571 F.2d 272, 274 (5th Cir. 1978), aff'g 6 BRBS 84, BRB No. 76-252 (1977), citing Blackwell Construction Co. v. Garrell, 352 F. Supp. 192, 196 (D.D.C. 1972); Smith v. Aerojet-General Shipyards, Inc., 13 BRBS 391, 647 F.2d 518 (5th Cir. 1981); Walker v. Pacific Architects & Engineers, Inc., 1 BRBS 145, BRB No. 74-112 (1974).

The fact that many years have passed between the work-incident and the filing of the claim does not affect employer's duty to file a Section 30(a) report.

> Statutes of limitations have traditionally been designed to promote fairness to defendants by precluding the prosecution of

> actions so old that 'evidence has been lost, memories have faded, and witnesses have disappeared.' Order of Railroad Telegraphers v. R.E.A., 321 U.S. 342, 349 (1944). Freedom from stale claims may still be outweighed, nonetheless, when justice requires that a delinquent plaintiff have his day in court. Burnett v. New York Central R.R. Co., 380 U.S. 424, 428 (1965). In addition, the humanitarian purpose of a remedial statute may be considered an expression of Congressional intent not to deprive a claimant of his rights when no purpose underlying a statute of limitations is served. Burnett, supra, at 434.

Belsom v. T. Smith & Son, Inc., 9 BRBS 333, 336, BRB No. 78-358 (1978), aff'd mem. 599 F.2d 447 (5th Cir. 1979).

Nor is employer's duty to file a 30(a) report alleviated by the fact that employer believed that claimant's injury was covered by the state Act. "Application of Section 30(f) does not require the employer to have definite knowledge that the injury comes within the jurisdiction of the Act." Castro v. McLean Industries, 12 BRBS 911, 914, BRB No. 79-419 (1980); Cooper v. John T. Clark & Son of Maryland, Inc., 11 BRBS 453, 460, BRB No. 78-525 (1979). See also Cuellar v. Garvey Grain Co., 11 BRBS 441, BRB No. 77-824 (1979), aff'd sub nom. Garvey Grain Co. v. Director, OWCP, 12 BRBS 821, 639 F.2d 366 (7th Cir. 1981).[7]

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[7]It should also be noted that the Supreme Court stated in Calbeck that it placed absolutely no

IV

Still to be addressed is whether the doctrines of election of remedies or res judicata bar the instant claim. In Landry v. Carlson Mooring Service, 13 BRBS 301, 643 F.2d 1080 (5th Cir. 1981), the Court held that the doctrine of election of remedies is "inapplicable when 'the second remedy which is pursued following an alleged "election" is not theoretically irreconcilable with the first, and does not require a claimant to assume a position inconsistent with that which he took in his initial quest for relief.'" Landry, 13 BRBS at 307, citing Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 1277 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979). The reasoning in this case is equally applicable to the situation herein: therefore, the doctrine of election of remedies does not preclude the instant claim.[8]

Nor does the doctrine of res judicata bar claimant's claim under the Act. In Landry, the

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weight upon a Department of Labor regulation promulgated to employers which indicated that employers would not be penalized for failure to file a first report regarding employees injured while engaged in new ship construction. The Department of Labor regulation was deemed not to be controlling, in that its interpretation of the law was clearly erroneous. 370 U.S. at 127 n. 15.

[8]Moreover, the doctrine has no application where the available remedies are concurrent and consistent. See Pierce v. United States, 255 U.S. 398

Court interpreted the Supreme Court's decision in Thomas v. Washington Gas Light Co., 12 BRBS 828, 100 S.Ct. 2647 (1980), and held that, despite the broad language of the plurality, Thomas should be viewed as that position of the Members who concurred in the judgment in the narrowest grounds. See Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976). See also Bardsdale v. Blackburn, 639 F.2d 1115, 1120 (5th Cir. 1981) (en banc). Thus, Thomas was interpreted as following the test of Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622 (1947).

> Absent unmistakable language, in either the [Maine] Workmen's Compensation Act or the cases construing it, declaring recovery under the [Maine] act a final adjudication of all claims possibly arising from the injury, McCartin requires a finding that a subsequent recovery under the workers' compensation act of another jurisdiction is proper. Thus, the issue here is whether the law of [Maine] provides such unmistakable language.

Landry, 13 BRBS at 305 (emphasis in original). As the Court in Thomas noted, "[a]pparently only Nevada's Workmen's Compensation Act contains the unmistakable language required under

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(1921). Inasmuch as Calbeck clearly establishes concurrent jurisdiction over injuries such as those sustained by claimant, and since I would hold Calbeck retroactively applicable to the instant case, election of remedies cannot bar this claim.

the McCartin rule." Thomas, 12 BRBS at 836 n. 21, 100 S.Ct. at 2657 n. 21. Thus, the Maine statute does not contain sufficient language to invoke the rule of res judicata.[9]

V

In conclusion, claimant has indicated his recognition of the fact that, at the time of his injury, there was in effect under the Act a $7,500 maximum limit on the amount of compensation receivable thereunder. 33 U.S.C. § 914(m). Offsetting the $6,000 the claimant has already received under the state Act, the additional compensation due would be only $1,500, plus any additional assessments due pursuant to Section 14(e) of the Act. 33 U.S.C. § 914(e). However, medical services and supplies under Section 7, 33 U.S.C. § 907, are not taken into consideration in applying the limit upon compensation contained in the Act. Cardillo v. Liberty Mutual Insurance Co., 101 F.2d 254 (D.C. Cir. 1938). It is this modest assistance that claimant seeks, and to which he is entitled under the law.

Accordingly, I would reverse the decision below, and award claimant benefits under the Act.

/s/Julius Miller
JULIUS MILLER
Administrative Appeals Judge

[9]This is consistent with the Supreme Court's decision in Sun Ship, Inc. v. Commonwealth of Pennsylvania, 12 BRBS 890, 100 S.Ct. 2432 (1980).

APPENDIX D

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, DC 20036

DONALD J. SIMPSON,
Claimant

v.

BATH IRON WORKS CORPORATION,
Employer

and

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY,

Carrier

Case No. 78-LHCA-957
OWCP No. 1-27995

DECISION AND ORDER

Before: WILLIAM A. GERSHUNY
Administrative Law Judge

Claimant seeks benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., based on a 1941 injury.

The facts are not in dispute. On November 21, 1941, Claimant, while in the employ of Bath Iron Works, sustained a severe spinal injury when he fell to the ground from the deck of a vessel under construction. He has been a paraplegic and totally disabled ever since. Claimant sought and was awarded maximum benefits under the Workmen's

Compensation Act of Maine. Almost 36 years later, on March 22, 1977, Claimant filed a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act. On April 26, 1977, Respondents filed their answer denying coverage.

Claimant's contention is a simplistic one: his claim is timely, under Sec. 30(f), in that Respondents had not, at any time prior to the filing of his claim in 1977, filed the report of injury required by Sec. 30(a); in 1962, twenty-one years after his injury, the Supreme Court in Calbeck v. Travelers Insurance Co., 370 U.S. 114, held for the first time that injuries on ships under construction were compensable under the Act, even though they might also be compensable under State law; Calbeck's construction of the Act is retroactive to the date of enactment, 1927; and he has made no binding election of remedies.

Shea v. Texas Employers' Insurance Association, 383 F.2d 16 (5th Cir. 1967), identical in all material respects with the facts here, is dispositive and requires dismissal of the claim. There, as here, claimant had no right to benefits under the Act as the time of injury, had received benefits under State law and, following Calbeck, filed a claim under the Act. Finding the election of remedies defense inapplicable for the reason that, at the time of injury, claimant had no remedy under the Act, the Court

of Appeals nevertheless held that, after the State judgment conclusively established that recovery may validly be provided by State law, the claim no longer was covered under Sec. 3(a) of the Act, which provided for benefits "only if recovery for disability or death through workmen's compensation proceedings may not validly be provided by State law."

ORDER

IT IS ORDERED that the claim be, and the same hereby is, DISMISSED.

/s/ William A. Gershuny
WILLIAM A. GERSHUNY
Administrative Law Judge

Dated: November 3, 1978
Washington, D.C.

APPENDIX E

144 Me. 162 (1949)

SIMPSON'S CASE

Sagadahoc. Opinion, May 18, 1949.

Workmen's Compensation. Statutes. Services and Aids.

The expenditures of an employer for services and aids furnished an employee in accordance with the provisions of Section 9 of the Workmen's Compensation Act do not constitute a part of the compensation payable to him under Section 11 of the act.

The Workmen's Compensation Act is intended primarily, to provide employees injured in industrial accidents with compensation during periods of total and partial incapacity limited in terms of both time and money.

The services and aids contemplated by Section 9 of the act are incidental to the compensation payable to him under subsequent sections, except so far as they are available before the beginning of the period during which such compensation is payable.

The services and aid to which an employee is entitled under Section 9 of the act are available to him before and during the time compensation is payable to him but not thereafter.

At the expiration of the maximum period, during which an injured employee is entitled to have compensation paid to him, or upon the payment, or accrual, of the maximum amount so payable, the authority of the commission in connection with the services and aids to which Section 9 is applicable terminates, except so far as it may be called upon to determine allowances for services and aids furnished during the compensation period.

ON APPEAL.

Appeal from *pro forma* decree entered pursuant to Industrial Accident Commission order. Appeal sustained. Case fully appears in opinion.

Hutchinson, Pierce, Atwood, Scribner, for petitioner.

William B. Mahoney, John P. Carey,
for Bath Iron Works Corporation and American Mutual Liability Insurance Company, respondents.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, MERRILL, JJ.

MURCHIE, J. The propriety of the decision of the Industrial Accident Commission, referred to hereafter as the "Commission," under review, on this appeal of the defendants from a *pro forma* decree of the Superior Court entered pursuant thereto, must be determined by construing the second and closing sentence of the first paragraph of Section 9 of The Workmen's Compensation Act, referred to hereafter as the "Act," as it was effective at the time of the industrial accident to which the proceedings relate, November 21, 1941, R. S., 1930, Chap. 55. The controlling language is:

> "The amount of such *services and aids* shall not exceed one hundred dollars unless a longer *period* or a greater sum is allowed by the commission."

The emphasized words (emphasis having been supplied) refer to the "reasonable and proper medical, surgical and hospital services, nursing, medicines and mechanical surgical aids" which the preceding sentence declares an employee shall be entitled to and the "first thirty days after the injury," during which it is there said he shall be so entitled. The "services and aids" will be so referred to hereafter. The quoted language has been contained in the Act since the enactment of P. L., 1919, Chap. 238, referred to hereafter as "the 1919 Act," where the services and aids were reenumerated instead of being referred to by a collective phrase. Section 10. It is now found in R. S., 1944, Chap. 26, Sec. 9, with immaterial changes.

The employee of the present proceedings, Donald J. Simpson, was injured so severely, while working as a welder in

the employ of Bath Iron Works Corporation, that complete paralysis from the waist down resulted. In the period commencing November 28, 1941, and ending April 8, 1948, compensation was paid to him, or accrued in his favor, aggregating the maximum amount of $6,000, payable to him under the Act, and his employer, or its insurer, paid out in addition thereto a substantial sum in excess of $100 for services and aids to him, the exact amount of which is not disclosed in the record. The settlement receipt given the employer, or its insurer, by the employee, acknowledging that the full sum of $6,000 had been paid to him, is dated June 26, 1948. During the period commencing April 6, 1948 and ending May 24, 1948, the employee paid money, and incurred charges, for services and aids, and for living expenses, all of which he and a nurse, supplying some of them, considered payable by his employer. When they were not paid, petitions were filed by the employee and the nurse, appropriate for having the amount payable therefor determined by the Commission, if its authority to act in connection therewith had not terminated. Awards of $39.69 and $105 were made thereon, covering a part of each claim, the amounts in excess being disallowed as representing "the ordinary expense of living" or as not representing expenses the employee "would not have had if he had had no injury."

The importance of the principle involved cannot be measured by the amount of money in issue. This is manifest when consideration is given to the claims of the parties. The petitioners assert that the Commission has authority to enlarge the period of time during which an employee shall be entitled to services and aids, and the amount to be paid therefor, without limit, except as the latter may be controlled by the words "reasonable and proper" in the first sentence of Section 9 of the Act, references in the sentence carrying the language to be construed to "the nature of the injury or the process of recovery," and an over-all provision in Section 32 that no "petition of any kind, except for review of incapacity, may be filed more than seven years fol-

lowing an accident." The employer asserts that the authority terminates as to each employee when he has been paid the maximum amount of compensation payable to him.

The petitioners ground their claim on the declaration of Section 8 of the Act, that an employee:

> "shall be paid compensation and furnished medical and other services;"

the references to "compensation and medical benefits," "compensation or other benefits," "compensation or medical benefits," "compensation and benefits" and "compensation or benefits" in Sections 15, 17, 24 and 27 of the Act, and of P. L., 1929, Chap. 300, referred to hereafter as "the 1929 Act," by contract with the references in the corresponding sections of the 1919 Act, Sections 13, 8, 26 and 28, to "compensation" alone; and particularly a change made in Section 9 of the 1919 Act, with which Section 10 of the 1929 Act compares, whereby the provision that no "compensation except" services and aids should be paid during a waiting period was changed to one that "compensation" should begin at a stated time after incapacity. Special emphasis is laid on the fact that this court in *Melcher's Case*, 125 Me. 426; 134 A. 542, said by way of dictum, on September 28, 1926, that money paid by an employer for services and aids must be considered as compensation because Section 9 of the 1919 Act, then effective, referred to them as such, and that, thereafter, the 1929 Act made it plain that such expenditures do not constitute a part of the maximum compensation payable to an employee.

Authorities are cited, both in the Commission decision and in the petitioners' brief, to support such a construction and they would be adequate for the purpose if authority on the point was needed. It is not. Those authorities, without distinguishing between those cited by the Commission and the petitioners, are *Petraska* v. *National Acme Co. et al.*, 95 Vt. 76; 113 A. 536; *Industrial Commission et al.* v. *Hammond*, 77 Colo. 414; 236 P. 1006; *Cardillo et al.* v. *Liberty*

Mutual Insurance Co., 69 App. D. C. 330; 101 F. (2nd) 254; *Morris* v. *Laughlin Chevrolet Co.* et al., 217 N. C. 428; 8 S. E. (2nd) 484; 128 A. L. R. 136, and an annotation following the report of the last of these cases in A. L. R.

If there was any point in deciding whether the money spent by the employer, or its insurer, for services and aids to Donald J. Simpson on account of the injuries he suffered on November 21, 1941 should be counted as a part of the $6,000 in compensation payable to him under the Act, the decision that it should not would have to be made without reference to any of the authorities aforesaid. The intention of the Act in that regard is made crystal clear by its language. On the actual issue, i. e. whether the authority of the Commission to extend services and aids beyond the period of 30 days, and the amount of $100, terminated as and when he had received, or became entitled to, the maximum amount of compensation payable to him, those authorities have no bearing.

On that issue the position taken by the employer has support in the decision of the Massachusetts Court in *George A. Meuse's Case*, 270 Mass. 29; 169 N. E. 517, 518. That the Massachusetts law in the sections corresponding to Sections 8, 15, 17, 24 and 27 of our Act makes no reference to "medical benefits," "other benefits" or "benefits," but to "compensation" alone, supplies no warrant for construing our Act, as the petitioners do, as intended to provide "two distinct types of benefits" for an employee, each having no relation to the other. The Act was intended primarily to provide employees with compensation for incapacity. Services and aids are incidental to such compensation, except so far as they are available before the beginning of the period during which compensation is payable. The Massachusetts Court, referring to the phrase "for a longer period" in the Massachusetts Act, said, in *Meuse's Case, supra*, that it:

> "means a period longer than two weeks; a period which is to continue for such a part of the compen-

> sation period as the * * Board * * should in its discretion determine,"

and later:

> "But the jurisdiction of the board was entirely at an end * * * when the compensation period was passed."

A further statement of the Massachusetts Court in that case is eminently appropriate in the present one, i. e. that it:

> "is a hard case; * * * no amount of money * * * will compensate the employee; but that affords no justification for reading into the statute a meaning * it does not contain."

The function of the Commission, and of this court in a case brought to it by appeal from a decision of the Commission, is to construe the Act without either adding to or subtracting from its language. The mandate of Section 29 of the Act for liberal construction of its provisions (now R. S., 1944, Chap. 26, Sec. 30) provides no warrant for administrative or judicial creation of rights or liabilities under the guise of construction. The measure of liberality is for legislative and not judicial determination. The enactment of the first Workmen's Compensation Act in this state, P. L., 1915, Chap. 295, established two measures for limiting the time during which its benefits should be available to employees. A time measure was fixed at 500 weeks, and a money measure at $3,000. Sec. 14. The money measure was increased to $4,200 in the 1919 Act, Sec. 14, to $6,000 in the 1929 Act, Sec. 11, and stands at $7,500 since the enactment of P. L., 1943, Chap. 328. The time measure has remained constant. The petitioners do not claim that the language to be construed, when written into the Act by Section 10 of the 1919 Act, evidenced such a legislative intention, or could have been construed, as they now claim. Their assertion is that the changes made in other sections of the Act by the 1929 Act, coupling compensation with

services and aids by a variety of wordings, show the intention they assert. The particular sections and the pertinent words are quoted *supra*.

Collectively the changes made by them cannot be said to show any intention with reference to services and aids except to eliminate the possibility that money paid for them should be considered a part of the maximum amount of compensation payable to an employee. They did not enlarge the overall controls except so far as time should be measured by money when $4,200, instead of $3,000, was paid out in less than 500 weeks; nor did the change made in Section 10 of the 1919 Act, in rewriting it as Section 9 of the 1929 Act, providing that an employee should be "entitled" to services and aids where the earlier recital had been that an employer should "promptly furnish" them. The provision of Section 8, quoted *supra*, is followed by the words "as hereinafter provided," indicating that the measures of the compensation and the services, by which term services and aids are there designated, are to be found in subsequent sections. Those measures are the ones stated in terms of time and money. Since the enactment of the 1929 Act, as before, services and aids are available to an employee before and during the time he is entitled to draw compensation but not thereafter. At the expiration of the maximum period during which he is entitled to draw it, or upon the payment, or accrual, of the maximum amount payable to him, without reference to services and aids, the Commission's authority in connection with services and aids terminates, except so far as it may be called upon to determine allowances for those furnished during the compensation period. The Commission had no authority to make the awards carried in the decision under review.

Appeal sustained.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1455.

DONALD J. SIMPSON,
Claimant, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and
BATH IRON WORKS CORPORATION, ET AL.,
Respondents.

DECREE

Entered: June 23, 1982

This cause came on to be heard on petition for review of a final order of the Benefits Review Board, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged, and decreed as follows: The decision of the Benefits Review Board is vacated and the cause is remanded for further proceedings consistent with the opinion filed this day.

Costs to petitioner.

By the Court:
/s/ DANA H. GALLUP
Clerk.

APPENDIX G

RELEVANT STATUTES

U.S. Code, 33 U.S.C. § 903(a).

(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

[33 U.S.C. § 903(a) is set forth above as it read before the 1972 amendments to the LHWCA. As the Court of Appeals noted (App. 2a), the parties agreed that the amendments had no effect on Simpson's already existing claim. Therefore, all statutory provisions here are pre-1972 amendments.]

[pre-1972 amendments]

33 U.S.C. § 913(a).

(a) The right to compensation for disability under this Act shall be barred unless the claim therefor is filed within one year after the injury. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year

after the date of last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred.

33 U.S.C. § 920(a).

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary--

(a) That the claim comes within the provisions of this Act.

33 U.S.C. § 930(a)(f).

(a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.

(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 13 of this Act shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.